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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

UNITED STATES OF AMERICA, ex rel.
GAUDINEER & COMITO, L.L.P.,

Petitioner,

v.

GARY GESAMAN, In His Individual Capacity,

Respondent.

On Petition For A Writ Of Certiorari To The Eighth Circuit Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

After *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000), is a state employee sued in his individual capacity a "person" under the False Claims Act, 31 U.S.C. § 3729 et seq.?

PARTIES

Petitioner is a limited liability partnership for which no corporate disclosure statement is required. Respondent is an individual.

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LOWER COURT DECISIONS

The Honorable Charles R. Wolle, United States District Judge for the Southern District of Iowa denied Relator's Motion to Amend the Complaint on October 30, 2000 in case No. 4-97-CV80199. On October 19, 2001, the Court of Appeals panel issued the opinion for which review is sought, *U.S. ex rel. Gaudineer & Comito, L.L.P. v. Iowa*, 269 F.3d 932 (8th Cir. 2001).

JURISDICTION OF THE COURT

On October 19, 2001, a panel of the Eighth Circuit Court of Appeals ruled that Defendant Gesaman had not acted outside his official duties as an administrator of a waiver program involving federal funds, and therefore, could not be sued in his individual capacity under the False Claims Act, 31 U.S.C. § 3729, and affirmed the District Court's ruling denying Relator's motion to amend the Complaint to assert allegations against Gesaman in his individual capacity. There are no other federal issues to be decided in this case and the Eighth Circuit's opinion is a final judgment for the purposes of this Petition.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

I. 1 U.S.C. § 1

§ 1. Words denoting number, gender, and so forth

In determining the meaning of any Act of Congress, unless the context indicates otherwise –

words importing the singular include and apply to several persons, parties, or things;

words importing the plural include the singular;

words importing the masculine gender include the feminine as well;

words used in the present tense include the future as well as the present;

the words "insane" and "insane person" and "lunatic" shall include every idiot, lunatic, insane person, and person non compos mentis;

the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;

"officer" includes any person authorized by law to perform the duties of the office;

"signature" or "subscription" includes a mark when the person making the same intended it as such;

"oath" includes affirmation, and "sworn" includes affirmed;

"writing" includes printing and typewriting and reproductions of visual symbols by photographing, multigraphing, mimeographing, manifolding, or otherwise.

II. 31 U.S.C.A. § 3729 (False Claims Act)

(a) Liability for certain acts. – Any person who –

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely

knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that –

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have

actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined. – For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information –

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) Claim defined. – For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure. – Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be

exempt from disclosure under section 552 of title 5.

(e) Exclusion. – This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

III. 42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This False Claims Act (FCA) suit was commenced on March 28, 1997 by Relator, an attorney, Carlton G. Salmons (Relator) against the State of Iowa, Iowa Department of Human Services and Gary Gesaman (Gesaman),

the State director of a Medicaid waiver program passed by Congress to benefit the severely and profoundly mentally retarded. Known as the Home and Community Based Services Waiver Program for the mentally retarded, Congress extended federal funding to allow community placement services for only those mentally retarded who would otherwise "require the level of care provided in a . . . intermediate care facility for the mentally retarded. . . . " 42 U.S.C. § 139n(c) (Supp. 1997). The HHS's Secretary's regulations required state assurances and certifications limiting eligibility for its program only to those mentally retarded who otherwise would require institutionalization in an ICF-MR. 42 C.F.R. §§ 441.301(b); 441.302(c); 441.302(g) (1996).

Filed before this Court's decision in *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 788 (2000), the Complaint alleged that Gesaman, the State director, had allowed program eligibility through a variety of devices in violation of these federal requirements (and state statutes and regulations implementing the federal eligibility limitations) to perhaps thousands of individuals who were neither retarded nor, if they were, required that level of care provided by an ICF-MR. Although later reversed on procedural grounds by the Iowa Supreme Court, *Keokuk County v. H.B.*, 593 N.W.2d 118 (Iowa 1999), the state trial court had concluded that the state of Iowa operated this Medicaid waiver program for the mentally retarded "arbitrarily, capriciously, unreasonably and with an abuse of discretion."

After the *Vermont* decision, the State of Iowa and Iowa Department of Human Services were dismissed and Relator sought to amend the Complaint to assert the same

claims against Gesaman *in his individual capacity*, since Gesaman's capacity as a defendant before *Vermont* had not been specified. The district court denied the amendment interpreting the *Vermont* decision " . . . to mean that Gesaman, the state official who implemented the state policy on behalf of the Department of Human Services and the State of Iowa, is not subject to liability any more in his individual capacity than in his official capacity. . . . ", Order, October 30, 2000 at 2 (App. 30) since "(w)hen performing the alleged acts, he was the State of Iowa personified." *Id.* at 3 (App. 31).[1]

The Court of Appeals' three judge panel, with one member dissenting, affirmed the district court's ruling albeit on grounds never asserted before the district court. For the panel majority, Judge Murphy decided that the attempted amendment suing Gesaman in his individual capacity was deficient because it failed to plead facts showing that Gesaman's conduct as a state employee was outside the scope of his official state duties, hence accomplished within his individual capacity. (App. 8-9).[2]

However, Judge Gibson, dissenting, believed that *Hafer v. Melo*, 502 U.S. 21 (1991), dictated that Gesaman could be sued in his individual capacity as a FCA "person" also holding that the Eleventh Amendment posed no bar to suit.

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[1] The district court had previously found that Relator was an original source under 31 U.S.C. § 3730(e)(4)(A).

[2] The Relator has abandoned its claim against Gesaman in his official capacity.

Relator's Petition for Rehearing En Banc was then denied. (App. 35-36).

The panel's decision conflicts with numerous decisions of this Court on an important matter of federal law: the viability of damage suits against state employees in their individual capacities for violations of federal law occasioned by acts within the scope of their official duties and the resulting immunities they may possess.

SUMMARY OF THE ARGUMENT

In contravention of this Court's holding in *Hafer v. Melo*, 502 U.S. 21, 23 (1991) that "state officials, sued in their *individual* capacities, are 'persons' within the meaning of § 1983," and notwithstanding the plain language of 31 U.S.C. § 3729 (False Claims Act) that subjects "[a]ny person" who submits a fraudulent claim to liability, the decision of the Eighth Circuit creates an unprecedented cloak of absolute immunity for state employees sued in their individual capacity.

REASONS FOR GRANTING THE PETITION

I. THE PANEL'S DECISION UNALTERABLY CONFLICTS WITH DECISIONS OF THIS COURT ON AN IMPORTANT MATTER OF FEDERAL LAW: WHETHER A STATE EMPLOYEE CAN BE SUED FOR DAMAGES IN HIS INDIVIDUAL CAPACITY

By ignoring decades of this Court's precedent which mandate a distinction between individual and official capacity suits, the panel's decision effectively abolishes

the carefully balanced common law of governmental employee immunity. Under the appeal court's analysis, governmental employees, no matter their rank or duties, are absolutely immune from suit and liability in their individual capacity. This directly conflicts with *Hafer v. Melo*, 502 U.S. 21 (1991), as well as a host of other cases decided by this Court.

In an unbroken and unqualified line of cases since 1945, this Court has recognized and upheld the distinction between official and individual capacity lawsuits against governmental actors holding that a governmental actor may be sued in his individual capacity for money damages without also offending the Eleventh Amendment to the Constitution.

In *Ford Motor Co. v. Dept. of Treasury of State of Indiana*, 323 U.S. 459, 65 S.Ct. 347 (1945), this Court observed:

> Where relief is sought under general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally.

Id., at 323 U.S. 350. In *Scheuer v. Rhodes*, 416 U.S. 232, 237-38 (1974), Chief Justice Burger, for the Court, embraced the same principle: ". . . damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office." *Id.* 416 U.S. at 237-38 (citations omitted). *See also Papasan v. Allian*, 478 U.S. 265, 278 n.11 (1986) ("When a state official is sued and held liable in his *individual* capacity, however, even damages may be awarded.") (emphasis in original); *Bender v. Williamsport*

Area School Dist., 475 U.S. 534, 543 n.6 (1986) ("Acts performed by the same person in two different capacities 'are generally treated as the transactions of two different legal personages.' "); *Kentucky v. Graham*, 473 U.S. 159, 167-68 (1985) (". . . it is clear that a suit against a government official in his or her personal capacity cannot lead to imposition of fee liability upon the governmental entity. A victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him."); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 n.24 (1997) (applying *Hafer* and holding that state officials can be sued in individual capacity even when conduct relates to their official duties); *Alden v. Maine*, 527 U.S. 706, 756-57 (1999) ("Even a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or *wrongful conduct* fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally.") (emphasis added).

In *Hafer v. Melo*, 502 U.S. 21 (1991), this Court was presented with the same situation as the appeals court in this case – the statute at issue excludes states and state agencies from its definition of "persons", as does the FCA. *See Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 788 (2000). This Court held that "state officials, sued in their *individual* capacities are 'persons' within the meaning of § 1983." *Hafer*, 502 at 31 (emphasis added). This Court expressly rejected any distinction based on whether the official's actions were within the scope of his authority, explaining that not to allow personal capacity suits against state officials acting

within the scope of their authority would "absolutely immunize state officials from personal liability for acts within their authority." *Id.* at 28. But this is precisely what the appeals court has done. By affirming the district court's decision that Gesaman is not a "person" under the FCA, the appeals court decision results in individually sued state employees enjoying an immunity from liability, as both states and their agencies were held to be immune in *Vermont*, with the result that the FCA is a dead letter even when state employees commit fraud upon the federal treasury. The only possible justification to ignore *Hafer* is that somehow the individual/official capacity distinction applies only in section 1983 cases. It obviously does not.

Neither statute nor case law indicates that a suit against a state official in his individual capacity can be filed only for violations of section 1983. The plain language of section 1983 and the FCA both apply to every "person" who acts in violation of the statute. Neither statute distinguishes between state officials acting within or without their official capacities, a matter which was certainly within the ability of Congress to do. As this Court stated in *Hafer*, "A government official in the role of personal-capacity defendant thus fits comfortably with the statutory term 'person'." 502 U.S. at 27.

This Court has recognized, Congress "says in a statute what it means and means in a statute what it says there." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)). When "the statute's language is plain, 'the sole function of the courts' " – at least where the disposition required by the

text is not absurd – " 'is to enforce it according to its terms.' " *Hartford Underwriters*, 530 U.S. at 6 (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989)). The FCA subjects to liability "[a]ny person" who submits a fraudulent claim. Congress could have limited the term "person" to include only those state employees acting outside the scope of their duties, but it did not. The FCA language is clear and should be enforced in this case to allow suit against Gesaman in his individual capacity, who is clearly a "person" under the statute, a matter upon which all members of this Court agreed in *Vermont*, 529 U.S. at 774 n.4 (citing 1 U.S.C. § 1).[3] No further analysis is required.

There exists no statutory or policy reason why the holding of *Hafer* allowing individual capacity suits for section 1983 actions should not apply to individual capacity suits for violations of the FCA. Other circuits, relying on *Hafer* and its progeny, have recognized that state officials, in their individual capacity, are subject to suit for violation of similar federal statutes. *See, e.g., Luder v. Endicott*, 253 F.3d 1020, 1022 (7th Cir. 2001) (holding state officials can be sued in individual capacities for violations of Fair Labor Standards Act); *Cornforth v. Univ. of Okla. Bd. of Regents*, 263 F.3d 1129, 1133-34 (10th Cir. 2001)

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[3] Other provisions of the FCA strongly suggest that individual capacity suits, even against federal employees, are allowed. Congress carved out narrow exemptions to *qui tam* suits against "a member of the armed forces arising out of such persons' service in the armed forces" and against "a senior executive branch official." 31 U.S.C. § 3730(e)(1), (2). If a FCA suit against federal employees in their individual capacities was not allowed, there would be no reason for these exemptions.

(holding state officials subject to individual capacity claims for violations of Family and Medical Leave Act). *But see Lizzi v. Alexander*, 255 F.3d 128, 137 (4th Cir. 2001).

The federal common law similarly allows state officials to be sued in their individual capacities, *Ford Motor Co.*, 323 U.S. at 462, while denying any absolute immunity for conduct within the scope of an official's duties. *Butz v. Economou*, 438 U.S. 478, 503 (1978). Yet with no citation of authority or recognition of the consequences of its holding, the appeals court has granted Gesaman an absolute immunity from suit by affirming that Gesaman cannot be a FCA "person" because his challenged acts were done as an employee of the State. The result is to render entirely useless the FCA as to an important class of defendants in defiance of the plain language of the statute and this Court's longstanding cases deciding otherwise.

The appeals court mysteriously transforms the disposition of this case from a "futility of an amendment" (App. 31) dismissal to a "failure to plead" dismissal. (App. 9). Premised on the proposition that Relator did not plead how Gesaman had acted outside the scope of his official duties, the court dismissed with prejudice the proposed amended complaint and claimed it need not reach the issue of whether Relator can even state a claim against Gesaman under the FCA in his individual capacity. (App. 9). In other words, the court, effectively decides sub silentio that the individual capacity holding of *Hafer* does not apply but then goes on to hold that it does not need to reach the issue of whether the unanimous *Hafer* holding even applies! This is manifest error.

This Eighth Circuit decision and the Ninth Circuit holding in *Bly-McGee v. California*, 236 F.3d 1014 (9th Cir. 2001) are re-writing the FCA in the wake of *Vermont*, in direct conflict with the plain language of the statute. 31 U.S.C. § 3729 does *not* provide "[a]ny person with the exception of state employees acting in their individual capacities . . . " nor does it provide "any person but with respect to state employees, only those who act outside their official duties. . . . " By re-writing this statute, these courts are creating a cloak of absolute immunity never provided for or intended by Congress and in direct conflict with this Court's holdings on that issue.

The Eleventh Amendment does not provide a basis for the appeals court's refusal to allow individual capacity suits. It is well settled that suits against individuals are not barred by the Eleventh Amendment. *See Taylor v. Bowers*, 966 F.2d 417, 423 (8th Cir. 1992); *Nix v. Norman*, 879 F.2d 429, 433 n.3 (8th Cir. 1989). "As a general rule, suits seeking damages from state officials in their individual capacities are not barred by the Eleventh Amendment." *Cornforth*, 263 F.3d at 1133 (citing *Hafer*). This is not a suit against state officials where "the state is the real, substantial party in interest," *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984), even though the state here has chosen to indemnify Gesaman. *Luder*, 253 F.3d at 1023. Finally, this is not a case where the judgment sought will interfere with public administration or restrain the state from acting or compel it to act. Holding Gesaman personally liable for violating state and federal regulations and thereby defrauding the United States would not place any type of onerous burden on the state, and would in fact "advance rather than thwart state

policy." *Luder*, 253 F.3d at 1024; *see Cornforth*, 263 F.3d at 1133 (declining to find state real party in interest, in part because judgment against individual state employee would not "legally require" state university to comply with federal regulation); *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1287 (10th Cir. 1999) ("[a] state's interest in administering a welfare program at least partially funded by the federal government is not such a core sovereign interest as to preclude the application of [the equitable relief exception to the Eleventh Amendment]"); *Lewis v. New Mexico Dept. of Health*, 94 F.Supp.2d 1217, 1232 (D.N.M. 2000) ("though states certainly have a special interest in administering their own social services programs, when they accept federal funding for a program they cannot escape suit against state officials for failure to comply with federal law governing that program . . . ").[4]

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[4] Nor is an Eleventh Amendment issue raised by Iowa Code section 669.21 which provides for indemnification of state employees. *See Regents of the University of California v. Doe*, 519 U.S. 425, 431 (1997) (holding that where the Eleventh Amendment is implicated it is the defendant's own potential liability, " . . . rather than its ability or inability to require a third party to reimburse it, or to discharge the liability in the first instance, that is relevant."); *Port Authority Trans-Hudson v. Feeney*, 495 U.S. 299, 316-17 and n. 10 (1990) (Brennan, J., concurring) (recognizing all circuit courts agree that indemnification by state does not create state employee immunity since the state was not the real party in interest nor directly liable for the money judgment entered against its employee).

CONCLUSION

Plaintiff pleaded, consistent with the requirements of the Federal Rules of Civil Procedure, a FCA violation by a state employee in his individual capacity. The appeals court mistakenly believes that state employees possess absolute immunity from any and all claims which arise out of the performance of their official duties. It fails to recognize that personal liability can attach to "official" acts. *Hafer*, 502 U.S. at 28-29. Personal liability is established through individual capacity suits. *Id.* Except for a very limited class of executive officials, legislators, and judges, *id.*, and except when the state is the real party in interest, *Pennhurst*, 465 U.S. at 106 (which is not the case here), persons like Gesaman can be held personally liable for acts within the scope of their employment. Their defense is not absolute immunity from *suit*, but qualified immunity from *liability*. This has been our common law heritage and is our modern day legal reality. *Scheuer*, 416 U.S. 232.

The appeals court's decision conflicts with decisions of this Court. As such, the petition for writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-3899

United States of America, ex rel. Gaudineer & Comito, L.L.P.,	*	
Plaintiff-Appellant,	*	
v.	*	Appeal from the United
State of Iowa, Iowa Department of Human Services;	*	States District Court for the Southern District of Iowa.
Defendants,	*	
Gary Gesaman;	*	
Defendant-Appellee	*	
Carol Ann Martin; Lori Ledger; First Resources Corporation; Alise Palmer; Rachelle Coloson La Master; Independent Case Management, Inc., Iowa Foundation for Medical Care,	*	
Defendants.	*	

Submitted: May 14, 2001
Filed: October 19, 2001

Before LOKEN, J. GIBSON, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

Gaudineer & Comito, L.L.P., a qui tam relator, brought this action under the False Claims Act against Iowa, the Iowa Department of Human Services (DHS), Gary Gesaman, an employee of DHS and the director of a state program which receives Medicaid funding, and other individuals and organizations which implement the state program. After the Supreme Court issued its decision in *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000), relator voluntarily dismissed all of its claims except that asserted against Gesaman in his official capacity. It also moved for leave to amend its complaint to assert a claim against Gesaman in his individual capacity. The district court[1] dismissed the action and denied the motion for leave to amend. Relator appeals, and we affirm.

Iowa received federal funding through DHS for a Medicaid program called the Home and Community Based Services Waiver. The waiver program allowed an individual with a developmental disability requiring intermediate level care to receive Medicaid funding for home and community based services rather than obtaining them in an institution. DHS promulgated and published eligibility rules for each year the waiver program was in operation. The Iowa rules defined "mental retardation" and "intermediate care facility." *See* IOWA ADMIN.

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[1] The Honorable Charles R. Wolle, United States District Judge for the Southern District of Iowa.

CODE 441-83.60. The Iowa regulations were consistent with federal law, and the United States Department of Health and Human Services and Iowa entered into a three year funding agreement for the waiver program in 1992 and a five year agreement in 1995. The program was administered by Gary Gesaman.

Relator sued Iowa, DHS, Gary Gesaman in his official capacity, and other parties for violating the False Claims Act (FCA), 31 U.S.C. § 3729. The FCA allows a private party, like the relator in this case, to bring a qui tam action on behalf of the United States alleging submission of a fraudulent claim to the government. A relator may recover damages and attorneys fees if it is successful, but it is required to deliver a copy of its complaint to the United States which has the right to intervene if it wants to pursue the claim. The United States has declined to intervene in this case.

The allegations in the complaint were based on information acquired by Carlton G. Salmons, one of the attorneys in relator law firm, while he was representing Keokuk County, Iowa in a state civil proceeding in which a key issue was whether an individual was mentally retarded. The federal district court abstained from hearing relator's claims until the state case had been concluded.

In the original complaint in this case relator sued the state, DHS, and Gesaman in his official capacity, alleging that they had defrauded the United States and inappropriately spent Medicaid funds. Relator alleged that DHS and Gesaman had disregarded published rules and that "Iowa, DHS, and Gary Gesaman ha[d] operated the

[waiver] program . . . allowing eligibility to those who were not mentally retarded." In respect to its claims against Gesaman in his official capacity, it alleged that contrary to DHS regulations, "[he] decided that between March, 1992 and August 1993 persons would be eligible [for the waiver program] . . . with IQs of 78 or less," and after August 1993 with IQ's of 75 or less. Relator claimed that Gesaman, acting on behalf of the state and DHS, allowed person [sic] "with IQs of between 70 and 78 [to participate] knowing there would be an exponential increase in the numbers of persons eligible." Relator asserted that "Iowa, DHS or Gary Gesaman [did not] disclose or inform the United States Department of Health and Human Services" about this aspect of the program. Relator also claimed that the individual in the Keokuk County case should not have been eligible for the program but had received federal funding. Relator sought triple damages, a civil penalty of up to $10,000 for each violation, costs, and attorney fees.

The defendants filed motions to dismiss on the basis that relator's action was not authorized by the FCA, that it was barred by the Eleventh Amendment, and that Salmons was not the original source of the information. The district court denied the motions, and discovery was initiated. Then the Supreme Court issued its decision in *Stevens,* 529 U.S. at 788, holding that states and state agencies were not "persons" subject to liability under the FCA. There was thus no longer a basis to sue them under the FCA, and relator voluntarily dismissed its claims except for that against Gesaman in his official capacity. Relator also moved to amend to assert a claim against Gesaman in his individual capacity.

Relator continued to maintain that it could sue Gesaman in his official capacity even after *Stevens* and also submitted a proposed amended complaint in support of its motion to amend. The proposed pleading, alleging a claim against Gesaman in his individual capacity, was almost identical to the original allegations against the state, DHS, and Gesaman in his official capacity. Relator merely eliminated Iowa and DHS from the allegations that published rules had been disregarded and that the waiver program had allowed "eligibility to those who were not mentally retarded" and now alleged them only against Gesaman. Relator again alleged that "Gesaman decided that between March, 1992 and August 1993 persons would be eligible [for the waiver program] . . . with IQs of 78 or less," and after August 1993 with IQ's of 75 or less and that Gesaman operated the program knowing there would be an increase in eligible persons. Relator now left out its earlier allegation that Gesaman was acting "for the Defendants State and DHS." The allegations in the proposed complaint were directed against Gesaman alone, but no new facts were alleged about his role and responsibilities as program administrator or how he may have been acting in his individual capacity.

The district court dismissed the original complaint after concluding that the remaining claim against Gesaman in his official capacity was really against the state and barred by *Stevens*. It also denied relator's motion to amend, reasoning that the proposed amendment would be futile since Gesaman had been implementing a state policy on behalf of DHS and had performed no acts in his individual capacity.

Relator argues on appeal that the district court erred in denying it leave to amend because Gesaman is a person amenable to suit under the FCA and the Eleventh Amendment does not bar its claims for money damages against him in either his official or individual capacity. Gesaman responds that he did not act outside his official capacity, that he is not a person under the FCA because the state is the real party in interest, and that the claims are in any event barred by the Eleventh Amendment.

Although relator contended in its brief that Gesaman was a person under the FCA when he was acting in his official capacity,[2] it conceded at oral argument that this position was no longer viable under *Stevens*. Since a damage claim against a state official in his official capacity is a suit against the state, *see Kentucky v. Graham*, 473 U.S. 159 (1985), a state employee sued for money damages for actions taken in an official capacity stands in the shoes of the sovereign and is not a person under the FCA. *See Stevens*, 529 U.S. at 788. The district court did not err in dismissing the damage claim against Gesaman in his official capacity.

Permission to file a first amended complaint "shall be freely given when justice so requires," Fed.R.Civ.P. 15(a), but denial of leave to amend may be justified by "undue delay, bad faith on the part of the moving party, futility of

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[2] Relator had argued in its brief that *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865 (8th Cir. 1999), would permit the suit against Gesaman in his official capacity. *Rodgers* did not address the statutory question of whether a damages claim can be made under the FCA against state officials in their official capacity, however.

the amendment or unfair prejudice to the opposing party." *Sanders v. Clemco Indus.*, 823 F.2d 214, 216 (8th Cir. 1987). The denial of leave to amend based on futility means that the court found that the amended complaint failed to state a claim, and our review is therefore de novo. *See J.R. Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 873 (5th Cir. 2000); *Frey v. City of Herculaneum*, 44 F.3d 667, 671 (8th Cir. 1995).

The FCA, 31 U.S.C. § 3729, subjects to liability "[a]ny person" who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." Although "person" has been defined by Congress to include "individuals," 1 U.S.C. § 1, the term does not include states or state agencies. *See Stevens*, 529 U.S. at 788-89, *overruling in part, United States ex rel. Zissler v. Regents of the Univ. of Minn.*, 154 F.3d 870, 874-75 (8th Cir. 1998) (holding that states are persons under the FCA).

Relator argues that Gesaman is a person when sued in his individual capacity for money damages under the FCA and claims that Gesaman acted in his individual capacity in extending the eligibility requirements and that the state is not the real party in interest. It also argues that whether an official is a person under the FCA should be construed the same as "person" under 42 U.S.C. § 1983. Gesaman responds that the state is the real party in interest because he did not act in his individual capacity, the Iowa indemnification statute would require that any judgement be paid with state funds, the complex DHS administrative process impacts critical aspects of

state sovereignty, and a judgment against him would require Iowa to alter its waiver program.

In determining whether a state official may be liable for money damages in his individual capacity, courts should not rely wholly on "the elementary mechanics of captions and pleading." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997). We should look at whether the alleged conduct of the defendant was "outside of [his] official duties." *Bly-Magee v. California*, 236 F.3d 1014, 1016 (9th Cir. 2001). Relator's allegations arise out of a multi year federal waiver program which Iowa was to administer, and Iowa delegated responsibility to determine eligibility to DHS and Gesaman. Iowa was the party which had the contractual relationship with the United States which would make it liable to the federal government for monies wrongly paid. After *Stevens* an FCA relator can no longer pursue money damages from the state, which Gesaman claims is the real party in interest.

When relator's original claims were blocked by the *Stevens* decision, relator attempted to add a claim against Gesaman in his individual capacity for the same acts it had previously alleged he was performing in his official capacity. Relator added no new or different factual allegations in its amended complaint, but simply reworded its complaint to remove Iowa and DHS as defendants and to eliminate statements that Gesaman was acting "for the Defendant State and DHS." Relator has not alleged what Gesaman's specific duties or powers were as administrator of the program or how he acted outside those duties by issuing eligibility standards which allegedly conflicted with state regulations.

Without any allegations about the extent and nature of Gesaman's duties, the mere assertion that he issued standards that conflicted with state law does not allege actions outside his official duties as administrator of the waiver program. Relator also has not provided any specifics of the agreements between the United States and Iowa or how Gesaman's actions may have been in violation of those agreements and federal law. Under these circumstances, the district court did not err in denying the motion for leave to amend to add a new claim against Gesaman in his individual capacity.[3]

Since the district court did not err in dismissing the complaint or in denying the motion to amend, we affirm the judgment.

JOHN R. GIBSON, Circuit Judge, dissenting.

I respectfully dissent. The court's opinion today overlooks *Hafer v. Melo*, 502 U.S. 21 (1991), which should guide our interpretation of what actions may be filed against state employees in their individual capacities.

Here, the law firm as relator brought a qui tam action under the False Claims Act, 31 U.S.C. §§ 3729-33 (1994), on March 28, 1997. The complaint named the State of Iowa, the Iowa Department of Human Services, and

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[3] In light of this conclusion, we need not consider whether a state official sued in his individual capacity is a person under the FCA or whether the claims against Gesaman are barred by the Eleventh Amendment. We also need not reach the issue of whether the term "person" under the FCA should be construed as under § 1983, a position advanced by relator without citation to any authority.

numerous employees, including Gary Gesaman, as defendants. The original complaint did not specify the capacity in which Gesaman was being sued. On May 22, 2000, the Supreme Court decided *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), holding that a qui tam action brought against a state under the False Claims Act must be dismissed because under the statute a state is not a person for the purposes of qui tam actions.[4] *Stevens* was based purely upon principles of statutory construction, and the Court found it unnecessary to consider whether the Eleventh Amendment would bar such actions. 529 U.S. at 787. Thereafter, relators in this case filed a motion for leave to amend their complaint, dismissing the state and all of its agencies and asserting claims against Gesaman in his official and individual capacity.

The district court interpreted *Stevens* to mean that Gesaman, the state official who implemented the state policy on behalf of the Department of Human Services, was not subject to liability in either his individual or official capacity. It stated that the alleged conduct for which Gesaman was named as a defendant was part of his duties as a state employee; thus, in performing the alleged acts, he was the State of Iowa personified, and so not subject to suit. In my view the district court erred and

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[4] *See* 31 U.S.C. § 3729(a) (1994) ("any person" who knowingly presents a false or fraudulent claim to the United States for payment or approval is liable for damages).

should have exercised its discretion to permit the filing of the amended complaint.[5]

The district court, and the court today, fail to take into consideration the teaching of the Supreme Court in *Hafer*, a 42 U.S.C. § 1983 case against state officers in their individual capacities that was based on actions the officers had taken in the course of their official duties. A prior decision had determined that "neither a state nor its officials acting in their official capacities are 'persons' under § 1983." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). A unanimous Supreme Court[6] nonetheless determined that "state officials, sued in their *individual* capacities, are 'persons' within the meaning of § 1983." *Hafer*, 502 U.S. at 31 (emphasis added). In reaching that conclusion, the Court expressly rejected any distinction based on whether the actions at issue were within the scope of the official's authority. The Court reasoned that not to allow personal capacity suits against state officials acting within the scope of their authority would "absolutely immunize state officials from personal liability for acts within their authority. . . . Yet our cases

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[5] The district court also based its decision on the belief that this court, in light of *Stevens*, would overrule *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 868 (8th Cir. 1998) (holding that a qui tam action under the False Claims Act "is a suit by the United States for Eleventh Amendment immunity purposes"). I agree that *Rodgers* has lost most of its validity in light of *Stevens*, and I also agree with the court today, *supra* at 6, that *Stevens* has overruled *United States ex rel. Zissler v. Regents of the University of Minnesota*, 154 F.3d 870 (8th Cir. 1998), to the extent that decision held that states are persons under the False Claims Act.

[6] Justice Thomas took no part in the consideration or decision.

do not extend absolute immunity to all officers who engage in necessary official acts." *Id.* at 28.

Like the Court in *Hafer*, we confront a statute that excludes states and state agencies from its definition of "persons" that can be sued, *Stevens*, 529 U.S. at 788, and we must decide whether that statute nonetheless allows state officials to be sued in their individual capacities. As the court recognizes, 1 U.S.C. § 1 (1994) creates a presumption that natural persons are covered by the use of the term "person" in a statute. *Supra* at 6; *see also Stevens*, 529 U.S. at 784 n.14. Neither the court nor Gesaman has provided any rationale of statutory construction to overcome that presumption. In light of *Hafer*, I would hold that state officials may be sued in their individual capacity under the False Claims Act. *See Luder v. Endicott*, 253 F.3d 1020, 1022 (7th Cir. 2001) (interpreting Fair Labor Standards Act, in light of *Hafer*, to permit a claim against state officers in their individual capacities); *cf. Alden v. Maine*, 527 U.S. 706, 757 (1999) ("[A] suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself. . . . "). *But see Lizzi v. Alexander*, 255 F.3d 128, 137 (4th Cir. 2001) (declining to apply *Hafer* to Family and Medical Leave Act case, in part because *Hafer* was decided under § 1983).

Only after we have concluded that the False Claims Act permits state officials to be sued in their individual capacities do we ask whether the state is nevertheless the real party in interest and whether the suit is thus barred by the Eleventh Amendment. *See Luder*, 253 F.3d at 1022 (analyzing first whether plaintiff can state claim against

supervisor in individual capacity under Fair Labor Standards Act, and only after answering that question in the affirmative discussing whether suit is really against the state for purposes of the Eleventh Amendment). This is the true significance of the Supreme Court's statement in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997), cited in part by the court today, *supra* at 6, that "[t]he real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading."

In addressing the Eleventh Amendment question presented here, it is important to recognize that "[a]s a general rule, suits seeking damages from state officials in their individual capacities are not barred by the Eleventh Amendment." *Cornforth v. Univ. of Okla. Bd. of Regents*, No. 00-6119, 2001 WL 930019, at *2 (10th Cir. Aug. 16, 2001) (citing *Hafer*, 502 U.S. at 30-31, and *Alden*, 527 U.S. at 757). However, even where a state official is sued in his or her individual capacity, the "Eleventh Amendment bars a suit against state officials when 'the state is the real, substantial party in interest.' " *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984) (quoting *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459, 464 (1945)). The state is the real party in interest when the judgment is sought from the public treasury, when the judgment would interfere with public administration, or when the judgment would restrain or compel state action. *Id.*, at 101 n.11. The fact that the state here has chosen to indemnify its officials does not make it the real party in interest. *Luder*, 253 F.3d at 1023 (citing cases). Nor is this a case where the judgment sought will interfere with public administration or restrain the state from acting or compel

it to act. Holding Gesaman personally liable for violating regulations of the state and thereby defrauding the United States would not place any type of onerous burden on the state, it would in fact "advance rather than thwart state policy." *Luder*, 253 F.3d at 1024; *see Cornforth*, 2001 WL 930019, at *3 (declining to find state real party in interest, in part because judgment against individual state employee would not "legally require" state university to comply with federal regulation). *But cf. Lizzi*, 255 F.3d at 137 ("The state would still suffer the indignity of having each discrete decision regarding personnel or organization matters subject to second-guessing by a federal court.").

Finally, the court today quotes *Bly-Magee v. California*, 236 F.3d 1014, 1016 (9th Cir. 2001), for the proposition that "[w]e should look at whether the alleged conduct of the defendant was 'outside of [his] official duties.'" *Supra* at 6. This scope-of-duty analysis, however, is more properly applied to the defense of personal immunity, as it in fact was in *Bly-Magee*, 236 F.3d at 1017-18 (acknowledging that qui tam claims under the False Claims Act fail as to the state and its agencies in light of *Stevens*, but analyzing claims against individual state officials in terms of immunity); *cf. Hafer*, 502 U.S. at 31 ("To be sure, imposing personal liability on state officers may hamper their performance of public duties. But such concerns are properly addressed within the framework of our personal immunity jurisprudence."). Because the district court did not allow the complaint to be amended so as to include a claim against Gesaman in his individual capacity, any affirmative defenses, including qualified immunity, are

not before us. *See Barrett v. Thomas,* 649 F.2d 1193, 1201 (5th Cir. 1981).

I would reverse the district court and allow amendment of the complaint to include claims against Gesaman in his individual capacity.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, ex rel. GAUDINEER & COMITO, L.L.P., Plaintiffs, vs. GARY GESAMAN, In His Official and Individual Capacity, Defendant.	CASE NUMBER: 4-97-CV—80199 PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT (Filed July 25, 2000)

COMES NOW the plaintiff, United States of America, et al. and pursuant to Rule 15, F. R. Civ. P., and this court's order of July 11, 2000 moves for leave to amend its complaint and in support thereof, states:

1. The attached amended and substituted complaint (Ex. A) asserts a False Claim Acts claim against Gary Gesaman, a state employee, in his official and individual capacity. Support for such a claim is found in the brief filed contemporaneously herewith.

2. No prejudice will inure to defendant if this amendment were granted.

3. The claims against the state of Iowa and Iowa Department of Human Services will be dismissed without prejudice pursuant to a stipulation under local Rule 41.1.

WHEREFORE, plaintiff prays that the court grant plaintiff's motion to amend and allow the attached

amended and substituted complaint to stand without further filing.

GREFE & SIDNEY, P.L.C.

By: /s/ John Werner by PJM
John Werner 0005936

By: /s/ Patrick J. McNulty
Patrick J. McNulty
0003593

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on the 24 *day of* July, *2000.*

By: X *U.S. Mail* __ *Fax*
_ *Hand Delivered* __ *Overnight Courier*
_ *Federal Express* __ *Other:*

Signature: Beth Dowd

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA, ex rel. GAUDINEER & COMITO, L.L.P.,	:	CASE NUMBER: 4-97-CV-80199
Plaintiffs,	:	
vs.	:	AMENDED AND SUBSTITUTED COMPLAINT
GARY GESAMAN, In His Official and Individual Capacity,	:	
Defendant.	:	

COMES NOW the plaintiff, United States of America, et al. and for its Complaint states:

INTRODUCTION

This action is brought under the provisions of the False Claims Act, 31 United States Code Section 3729 *et. seq.* It arises by virtue of the Medicaid relationship between the United States of America, Department of Health and Human Services, Health Care Financing Administration (HCFA) and the state of Iowa through one of its agencies, the Department of Human Services (DHS). Under this Medicaid relationship, HCFA has advanced federal monies to the state of Iowa since 1992 for use in supporting those mentally retarded who required the level of services provided in an intermediate care facility for the mentally retarded under a Medicaid

waiver known as the Home and Community Based Services Waiver for the mentally retarded, (HCBS-MR). This HCBS-MR program is authorized by 42 United States Code Section 1396n(c) (Supp. 1995).

I.

THE PARTIES

1. The action is commenced by the plaintiff, United States of America, pursuant to 42 United States Code Section 3730(b) on the relation of Gaudineer & Comito, LLP.

2. The defendant Gary Gesaman, at all times material hereto, was an employee of the Iowa Department of Human Services, (DHS) and was the person primarily responsible for the HCBS-MR program in Iowa since the programs' inception.

II.

JURISDICTION AND VENUE

3. Subject matter jurisdiction over the action is premised under 28 U.S.C. § 1331.

4. Subject matter jurisdiction over this action is also premised under 31 U.S.C. § 3730(e)(4)(A). The plaintiff relator acquired the information upon which this action is premised in the representation of Keokuk County, Iowa in civil proceedings for declaratory judgment commenced by Keokuk County on January 3, 1995 in an action, as amended, entitled *Keokuk County, Iowa v. D.K., A.R., J.B., and H.B., Defendants v. State ex. rel. Iowa Department of*

Human Services, Charles M. Palmer, Director, Intervenor-Cross Defendant, Keokuk County Equity Case No. CE 2191095 (37-219).

5. Subject matter jurisdiction over this action is alternatively premised under 31 U.S.C. §3730(E)(4)(A,B). The plaintiff relator law firm was and is the original source of the information upon which the allegations of this Complaint are based and acquired direct and independent knowledge of such information in the conduct of the Keokuk County civil proceedings for the plaintiff there, Keokuk County, Iowa. Such information has been previously provided to the United States of America.

6. Venue of this action in the United States District Court for the Southern District of Iowa is premised under 28 U.S.C. § 1391(b)(2), (3) and 28 U.S.C. § 1395(a).

COUNT I

7. Pursuant to 42 U.S.C. § 1396n(c)(3), the United States Department of Health and Human Services granted a three year waiver to the state of Iowa and DHS commencing on or about March 1, 1992 and, thereafter, a five year waiver commencing on or about March 1, 1995 and continuing through February 28, 2000 for the HCBS-MR Waiver program. Under this program, persons with mental retardation who required the ICF-MR level of care could receive Medicaid funding for home and community based services that would otherwise have been provided in an ICF-MR institutional setting either privately owned or a state hospital-school for the mentally retarded.

For each of the years the HCBS-MR Waiver program has been in operation, DHS has promulgated and published in the Iowa Administrative Code, pursuant to Iowa's Administrative Procedure Act, Iowa Code Chapter 17A, rules which defined "persons with mental retardation", "intermediate care facility for the mentally retarded" and which set forth the eligibility requirements for the HCBS-MR Waiver program. *See* Iowa Administrative Code [441] § 83.60 *et seq*. These rules were consistent with the legislative purposes of both 42 U.S.C. § 1396(c) and of the Iowa Legislature.

9. Defendant Gary Gesaman, an employee of DHS, has had primary responsibility for the operation of the HCBS-MR Waiver program in Iowa.

10. Contrary to published rules and regulations which defined a person with mental retardation, in part, to have an IQ of 70 or below for purposes of the HCBS-MR Waiver program, defendant Gary Gesaman decided that between March 1992 and August, 1993 persons would be eligible for the HCBS-MR Waiver program with IQs of 78 or less. In August 1993 defendant Gesaman decided that persons with IQs of 75 or less would be eligible for the HCBS-MR Waiver program and those who had earlier been certified as eligible with IQs of 78 or less would be "grandfathered" into the program. From August, 1993 forward, defendant Gesaman allowed HCBS-MR Waive program eligibility to those with IQs of 75 or less. These determinations by defendant Gesaman were communicated to the Iowa Foundation for Medical Care and Iowa State University by various letters, circulars and memoranda despite the contrary eligibility

requirements established by promulgated rules in the Iowa Administrative Code [441] § 83.60 *et seq.*

11. From March 1992 to the present, the Iowa Foundation for Medical Care has certified the eligibility of persons into the HCBS-MR Waiver program based upon the illegal eligibility requirements prescribed by defendant Gary Gesaman in various of his letters, circulars and memoranda, not based upon the published rules in Iowa Administrative Code [441] § 83.60 *et seq.* This resulted in certifications of eligibility of individuals who were in fact not eligible under applicable law.

12. Since March, 1992 defendant Gary Gesaman has operated the HCBS-MR program in Iowa allowing eligibility to those who were not mentally retarded under the applicable standards of the American Psychiatric Association Diagnostic and Statistical Manuals – DSM III or DSM IV. These ineligible individuals include those with IQs of between 75 and 78 between March, 1992, and August, 193 [sic] and those with IQs of 75 or below from August, 1993 to present.

13. Despite an intervening Iowa statute which became effective July 1, 1995, and which adopted the provision of the DSM IV as applicable to the mentally retarded, Iowa Code § 222.60 (Supp. 1995), defendant Gesaman still allowed HCBS-MR program eligibility to any person with an IQ of 75 or below.

14. Despite published rules concerning the HCBS-MR program defining a "person with mental retardation" to have an IQ of 70 or below and, later, "approximately 70 or below", defendant Gesaman disregarded such rules and, instead of applying such rules to the HCBS-MR

program, directed the Iowa Foundation for Medical Care to apply various inconsistent letters, directives and memoranda in determining the eligibility of persons into the HCBS-MR program, all in violation of the requirements of applicable law.

15. Defendant Gesaman allowed HCBS-MR program eligibility to persons with IQs of above 70 knowing that such individuals are generally diagnosed as having borderline intellectual functioning.

16. Defendant Gesaman decided to allow eligibility to the HCBS-MR program to those with IQs of between 70 and 78 knowing there would be an exponential increase in the number of persons eligible yet never consulting with any statisticians or psychologists to determine the populations so made eligible.

17. That defendant Gesaman's operation of the HCBS-MR waive program, as elaborated above, was contrary to and in violation of the pertinent HHS-HCFA federal regulations governing such program, and Gesaman did not disclose to nor obtain authority from HHS-HCFA to implement the program in the manner described above.

18. As a consequence of the foregoing, defendant Gesaman has made eligible for the HCBS-MR Waiver program thousands of Iowans who were not eligible under applicable law.

19. Defendant Gesaman has knowingly allowed HCBS-MR program eligibility to those who are not mentally retarded and, upon information and belief, there are and remain in the HCBS-MR program several hundred if

not more than one thousand such individuals for whom claims have been submitted for payment to the United States Department of Health and Human Services in violation of 31 U.S.C. § 3729(a)(2), (3) and (7).

20. In addition, Gesaman, since the operation of the HCBS-MR program began in Iowa in March has knowingly certified HCBS-MR program eligibility to Iowans who were mentally retarded but who did require the ICF-MR level of care by reassigning to the ICF-MR level of care, for HCBS-MR program eligibility, those mentally retarded who had been certified and prescribed as appropriate for the RCF-MR or CSALA levels of care and who, in fact, had lived in and received services as [sic] these levels of care prior to the establishment of HCBS-MR program eligibility.

21. Defendant Gesaman has knowingly certified to the United States Department of Health and Human Services the HCBS-MR program eligibility of Iowans who were not and are not mentally retarded and Iowans who, while mentally retarded, did not and do not require the ICF-MR level of care for payment by the United States Department of Health and Human Services in violation of 31 U.S.C. § 3729(a)(2) and (3).

RELIEF REQUESTED

22. The Court should bifurcate this action into a trial first determining the liability of defendant and, if liability is established, then determining those who have been fraudulently and wrongfully certified into the HCBS-MR program.

23. The determination of those who have been fraudulently and wrongfully certified into the HCBS-MR program is and will be dependent upon the individual facts of each persons's medical and psychological circumstances concerning whether or not a given individual was retarded and, if so, whether that person required the CIF-MR level of care which are complicated psychological and medical determinations within the province of licensed professionals.

24. Pursuant to Federal Rule of Civil Procedure 53(a) this court, if liability is determined, should refer to a Master the issues of whether individuals who have been and are in the HCBS-MR program were mentally retarded and, if so, whether such individuals required or require the ICF-MR level of care.

25. That this court enter judgment against defendant Gary Gesaman in an amount equal to three times the amount of damages the United States Government has sustained because of the certifications into the HCBS-MR program of those individuals who are not mentally retarded and who did not require the ICF-MR level of care plus a civil penalty of $5,000 to $10,000 for each violation plus the costs of this action, with interest, including the costs of the United States of America for its expenses related to this action, all pursuant to 31 U.S.C. § 3729(a).

26. That the relator be awarded all costs incurred, including reasonable attorneys fees.

27. That the relator be awarded an amount that the court decides is reasonable for collecting the civil penalty and damages, which shall not be less than 25 percent nor

more than 30 percent of the proceeds of this action or settlement pursuant to 31 U.S.C. § 3730(d)(2).

28. That the United States of America and relator receive any other relief, legal and equitable, to which they may be reasonably entitled.

GREFE & SIDNEY, P.L.C.

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By: /s/ Patrick J. McNulty
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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective

addresses disclosed on the pleadings on the 24 day of July, 2000.

By: X *U.S. Mail* __ *Fax*
__ *Hand Delivered* __ *Overnight Courier*
__ *Federal Express* __ *Other:*

Signature: Beth Dowd

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, ex rel. GAUDINEER & COMITO, L.L.P., Plaintiff, vs. STATE OF IOWA; IOWA DEPARTMENT OF HUMAN SERVICES; GARY GESAMAN; CAROL ANN MARTIN; LORI LEDGER; FIRST RESOURCES CORPORATION; ALISE PALMER; RACHELLE COLOSON LaMASTER; INDEPENDENT CASE MANAGEMENT, INC.; CYNTHIA MAY SCHUMACHER; IOWA FOUNDATION FOR MEDICAL CARE, Defendants.	)	NO. 4-97-CV-80199 ORDER (Filed Oct. 30, 2000)

Plaintiff has voluntarily dismissed, by stipulation, the claims asserted in the original complaint filed on March 28, 1997. The dismissal referenced *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 120 S. Ct. 1858 (2000), where the Court held that a State is not

a "person" subject to liability under the qui tam provisions of the False Claims Act (FCA).

Remaining in this case is plaintiff's claim under the FCA against defendant Gary Gesaman in his official capacity as an employee of the Iowa Department of Human Services operating a Medicaid waiver program. Plaintiff now seeks to amend its complaint to assert a claim against Gesaman in his individual capacity. On September 7, 2000, the court held a hearing by telephone conference call to receive arguments of counsel on plaintiff's resisted motion to amend.

The motion to amend is denied. Because the proposed new claim is the only claim not previously dismissed by stipulation, the court directs the clerk of court to dismiss this case in its entirety, with prejudice.

This court interprets the *Vermont Agency* decision to mean that Gesaman, the state official who implemented the state policy on behalf of the Department of Human Services and the State of Iowa, is not subject to liability any more in his individual capacity than in his official capacity.

Granted the Court did not . *Vermont Agency* hold that a state official acting as an individual is immune from liability. The type of claim asserted by the proposed amendment was not there explicitly decided nor addressed. But the defendant Gesaman has provided overwhelming support in his motion papers – based on the pleaded factual circumstances and logic of the law – for dismissal of plaintiff's motion to amend. I firmly believe plaintiff may not and cannot obtain judgment

against defendant Gesaman on the proffered pleaded facts and law.

I read the motion to amend broadly and liberally. *Baldwin County Welfare Ctr. v. Brown*, 466 U.S. 147, 150 (1984). I would freely grant leave to amend if the pleaded facts, proved at trial, would enable plaintiff to prevail. That cannot and may not happen in this case.

I would allow plaintiff to proceed with the proposed new plan if I believed *Vermont Agency* did not, by necessary implication, fatally cripple *United States of America ex rel. Rodgers v. State of Arkansas*, 154 F.3d 865, 868 (8th Cir. 1998). But I believe the Eighth Circuit Court of Appeals, in the face of *Vermont Agency*, would summarily overrule its *Rogers* decision.

Gesaman is named as a defendant solely and only because he was engaging in the allegedly unlawful conduct within his specific role as the employee operating the Medicaid waiver program between the Federal Government and the State of Iowa. He was empowered and acted only as the authorized employee of the State Department of Human Services. When performing the alleged acts, he was the State of Iowa personified. When not a State of Iowa employee, he performed no acts and engaged in no conduct challenged by the plaintiff in its proposed amended, newly pleaded claim.

Plaintiff's resisted motion to amend is denied and this lawsuit is dismissed with prejudice.

IT IS SO ORDERED.

Dated this 30th day of October, 2000.

/s/ Charles R. Wolle
CHARLES R. WOLLE, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JUDGMENT IN CIVIL CASE
CASE NO.: 4-97-80199

UNITED STATES OF AMERICA, ex rel. GAUDINEER & COMITO, L.L.P.,
Plaintiff,

vs.

STATE OF IOWA; IOWA DEPARTMENT OF HUMAN SERVICES; GARY GESAMAN; CAROL ANN MARTIN; LORI LEDGER; FIRST RESOURCES CORPORATION; ALISE PALMER; RACHELLE COLOSON LaMASTER; INDEPENDENT CASE MANAGEMENT, Inc.; CYNTHIA MAY SCHUMACHER; IOWA FOUNDATION FOR MEDICAL CARE,
Defendants.

(Filed Oct. 30, 2000)

___x___ **DECISION BY COURT.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

This lawsuit is dismissed.

Oct. 30, 2000
Date

/s/ James R. Rosenbaum
Clerk

/s/ D. Ryan
(By) Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-3899

United States of America, ex rel. Gaudineer & Comito, L.L.P.,	*	Order Denying Petition for Rehearing and for Rehearing En Banc
Appellant,	*	
vs.	*	
State of Iowa; Iowa Department of Human Services,	*	
Defendants,	*	
Gary Gesaman,	*	
Appellee,	*	
Carol Ann Martin; Lori Ledger; First Resources Corporation; Alise Palmer; Rachelle Coloson LaMaster; Independent Case Management, Inc.; Iowa Foundation for Medical Care,	*	
Defendants.	*	

The petition for rehearing en banc is denied. Judge McMillian would grant the petition. The petition for rehearing by the panel is also denied. Judge John R. Gibson would grant the petition.

(5128-010199)

December 13, 2001

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
MAY 17 2002
CLERK

No. 01-1645

In The
Supreme Court of the United States

UNITED STATES OF AMERICA, ex rel.
GAUDINEER & COMITO, L.L.P.,

Petitioner,

vs.

GARY GESAMAN, In His Individual Capacity,

Respondent.

On Petition For A Writ Of Certiorari To The Eighth Circuit Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Can *Vermont Agency v. U.S. ex rel. Stevens,* 529 U.S. 765 (2000), and the sovereign immunity of the State, be skirted by merely changing the caption of the pleadings?

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STATEMENT OF THE CASE

Much is spoken by omission in Petitioner Relator's recitation. Austin-Gaudineer, a Des Moines law firm, and a private relator under the False Claims Act (FCA), 31 U.S.C. § 3729, *et seq.*, is suing to reap a bounty for alleged fraudulent claims for federal Medicaid reimbursement, by the State of Iowa, through its Department of Human Services (DHS) in the Home and Community Based Waiver program (HCBW). The state program was, for the five years prior to the litigation, one of the responsibilities of DHS employee Gary Gesaman. This case was originally filed in 1997 against the State, its agency, and its employee, Gesaman.

The Department of Human Services through Gesaman was accused of violating its own State administrative regulation only. *See* Iowa Admin. Code 441-83.60. The Iowa regulations and statutes were conceded by the Relator to be in compliance with the federal requirements. The Relator claimed in its original Complaint that Gesaman acted on behalf of the State and its agency. Not until oral argument before the Circuit did the Relator concede that Gesaman could not be sued in his official capacity. (App. 6, n.2) The State has always agreed with the allegations of the Relator, i.e., that Gesaman acted in the State's behalf. Notably, in its Petition for Certiorari, the Relator promotes Gesaman to "director" of the program, apparently to make him more independent. (Petition, p. 7) While the action is brought in the name of the United States, the United States has declined to intervene.

After *Vermont Agency v. United States ex rel. Stevens*, 529 U.S. 765 (2000), Relator dismissed its Complaint

against the State and its agency, and sought to file an Amended Complaint to assert claims against Gesaman in his official and individual capacity, but without changing any of the factual allegations. As the Circuit described it: "[T]he proposed Amendment was almost identical to the original complaint." (App. 5) Relator simply "attempted to add a claim against Gesaman in his individual capacity, for the same acts it had previously alleged he was performing in his official capacity." (App. 8) The Relator omitted previous allegations that Gesaman was acting "for the Defendants State and DHS," but "no new facts were alleged about his role and responsibilities as program administrator or how he may have been acting in his individual capacity." (App. 5) Relator also did not provide "any specifics of the agreements between the United States and Iowa or how Gesaman's actions may have been in violation of those agreements." (App. 9) The Circuit determined that merely changing the nomenclature over the same facts "failed to state a claim."

The Eighth Circuit affirmed the dismissal of the district court, which had found Gesaman, under Relator's pleading, to be the "alter-ego of the state." Relator's suggestion that the opinion was based on grounds "never asserted before the district court" is just wrong. (Petition, p. 8)

SUMMARY OF THE ARGUMENT

The Eighth Circuit did not need to reach Relator's issue, and error has not been preserved. The Circuit affirmed the denial of Relator's request to amend its nomenclature after *Vermont Agency v. United States ex rel.*

Stevens, 529 U.S. 765 (2000), by alleging "individual capacity," but without adding to its pre-*Stevens* allegations that the state employee acted on behalf of the State and its agency. Consistent with this Court's decisions, the distinction between official and personal capacity suits was confirmed to be "more than a mere pleading device" and employees sued in their official capacity are really suits against the State, which are prohibited after *Stevens*.

REASONS FOR DENYING THE PETITION

I. RELATOR'S ISSUE WAS NOT DECIDED BY THE CIRCUIT

The issue as framed by Relator was not ruled upon below and error has not been preserved. The Eighth Circuit found the proposed name-change "failed to state a claim for relief" and was, therefore, futile. Fed.R.Civ.P. 15(a).

> n.3 In light of this conclusion, we need not consider whether a state official sued in his individual capacity is a person under the FCA or whether the claims against Gesaman are barred by the Eleventh Amendment. We also need not reach the issue of whether the term "person" under the FCA should be construed as under Section 1983, a position advanced by relator without citation to any authority.

(App. 9)

II. THE CIRCUIT DECISION IS CONSISTENT WITH *HAFER v. MELO*, 502 U.S. 21 (1991). GESAMAN IS SUED HERE IN HIS OFFICIAL CAPACITY.

Under the Eleventh Amendment, as a general rule, the State or its agency may not be sued directly in federal court. A suit against a State official in his or her official capacity is prohibited as well. *Kentucky v. Graham*, 473 U.S. 159 (1985). State officials, as a general rule, may be sued in their individual or personal capacity. *Hafer v. Melo*, 502 U.S. 21 (1991). There can be no disagreement with the litany of cases cited by the Relator in support of these propositions.

However, an action against a government officer in his official capacity does not become an individual capacity claim simply because of the labels used. When ambiguity appears, as here, a reviewing court must look to the substance of the allegations and the progression of the claim to determine the precise nature of the action. Indeed, the use of the phrase "individual capacity" is not by itself sufficient. *Bender v. Williamsport Area School District*, 475 U.S. 534, 543 (1986) (mere incantation of the term is not enough to transform an official capacity action into an individual capacity, but to "paraphrase our holding in *Brandon v. Holt*, 469 U.S. 464, 469 (1985), '[t]he course of proceedings make it abundantly clear that the action against [Mr. Youngman] was in his official capacity and only that capacity' ").

As this Court made clear in *Kentucky v. Graham*, 473 U.S. 159, 166 (1995), an official capacity action is really an action against the governmental entity, of which the official was merely an agent, and it lies when the entity was the "moving force" behind the conduct. *Hafer* did not

change that requirement. The Court in *Hafer* specifically did not discuss the method by which the individual-official dichotomy is to be reconciled.

> FN The Third Circuit looked to the proceedings below to determine whether certain respondents brought their claims for damages against Hafer in her official capacity or her personal capacity. (Cite omitted.) Several Courts of Appeals adhere to this practice. (Cite to 7th, 10th and 11th Circuits omitted.) Still others impose more rigid pleadings requirements. (Cite to 6th and 8th Circuits omitted.) Because this issue is not properly before us, we simply reiterate the Third Circuit's view that "it is obviously preferable for the plaintiff to be specific in the first instance to avoid any ambiguity."

Hafer, 502 U.S. at *24. "*Will* itself makes clear that the distinction between official capacity suits and personal capacity suits is more than a 'mere pleading device.'" *Hafer*, at 27, citing to *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989).

Gesaman was originally named as a defendant because of his conduct on behalf of the state and its agency. Having lost the original claim as a result of *Stevens*, the Relator is impaled on the horns of a dilemma of its own creation: liability against the State and its agency was based on the actions of its employee, but when the State is dismissed, the employee is now alleged to have acted individually, *without any further factual allegations regarding that conduct*. The original allegations of agent for the State are mirror images of the current allegation of personal liability.

III. THE CIRCUITS ARE CONSISTENT.

The Fourth and Ninth Circuits have reached similar conclusions. *See Lizzi v. Alexander*, 255 F.3d 128 (4th Cir. 2001) (real party in interest was state in terminated employee's damages action against individual supervisors alleging that termination violated FMLA, regardless of whether complaint purported to be against supervisors in their individual capacities); *Bly-Magee v. California*, 236 F.3d 1014, 1016 (9th Cir. 2000) (if sued in an official capacity, defendants have absolute official immunity, and if sued in individual capacity, defendants are similarly absolutely immune for conduct during performance of official duties).

In *Bly-Magee*, the Ninth Circuit first dismissed the Complaint against the State and its agencies under *Stevens*, but unfortunately did so in language calling upon "sovereign immunity from liability under the FCA." *Id.* at 1017. In *Stevens,* however, the issue of immunity was not addressed. The Ninth Circuit's remaining discussion of whether a valid claim exists for claims against those defendants for "conduct outside of their official duties" is couched in language of "immunity." If viewed as a statutory analysis case, however, *Stevens* directs the discussion toward whether a State administrator is in reality the alter-ego of the State (as is its agency), and, therefore, an impermissible defendant under the FCA. The scope of duties test of *Bly-Magee* is not only appropriate but called-for by *Hafer, Will, Brandon,* and *Alden v. Maine*, 576 U.S. 706, 756-57 (1999) (suit may be pursued "against a state officer in individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself.").

IV. THE PROPOSED AMENDMENT DID NOT COMPLY WITH F.R.C.P. 9(b).

Allegations of "fraud shall be stated with particularity." The FCA is a fraud statute. Defendants accused of defrauding the government have the same pleading protections as those accused of fraud in other contexts. *See United States ex rel. Thompson v. Columbia*, 125 F.3d 899 (5th Cir. 1997); *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475 (2d Cir. 1995); *United States ex rel. Cooper v. Blue Cross of Florida*, 19 F.3d 562 (11th Cir. 1994). Petitioner's assertion to the contrary notwithstanding (Petition, p. 17), the requested name-change did not comply. The Eighth Circuit found Relator's pleading void of the required particularity. (App. 5, 8)

This failure under F.R.C.P. 9(b), coupled with knowledge of the "progression of this litigation," leads to the conclusion that, aside from "the elementary mechanics of captions and pleadings" (*Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270 (1997)), Gesaman is being sued in his official capacity. Relator concedes that cannot be done.

V. THE CIRCUIT DID NOT DISCUSS, AND THUS DID NOT PRECLUDE, INDIVIDUAL LIABILITY.

Because the Circuit decision is consistent with *Hafer*, the decision will not "absolutely immunize State officials from personal liability," Relator's cry of wolf notwithstanding. It is not the decision which raises this specter, but the omissions in Relator's pleadings. The Relator acknowledges tacitly that this is an official capacity action by reciting identical factual allegations to those made when Gesaman was sued as the State's agent. Barred from

bringing an "official conduct" claim under *Stevens*, but-for the titular incantation "individual capacity," Relator only alleges the identical acts formerly alleged to be on behalf of the state and its agency.

The fears of the Relator can be put to rest. The Eighth Circuit said nothing about the liability of a State administrator sued for conduct in his individual capacity, and thus said nothing about "absolute immunity" for that conduct. (App. 9, n.3) For the reason that Gesaman is actually being sued in his official capacity, which Relator concedes is impermissible, the Relator has failed to state a claim.

VI. THE FALSE CLAIMS ACT WAS NOT INTENDED TO REACH STATE ADMINISTRATORS.

A. The Definition of "Person" in 42 U.S.C. § 1983 Is Not Controlling.

Crucial to the analysis of the Relator is its argument, without citation of authority, that *Hafer's* definition of "person" under 42 U.S.C. § 1983 is equally applicable to the FCA. The Circuit did not reach this question. (App. 9, n.3) It was unnecessary, given the conclusion that Gesaman was still being sued in his official capacity.

Hafer is inapposite. That decision was based on the "broad language" of Section 1983, *Hafer*, 502 U.S. at 28, and was targeted at those "who carry the badge of authority of the State." *Id.*, at 28. "Because of that intent, [this Court] has held that in Section 1983 actions the statutory requirement of action 'under color of' state law is just as broad as the Fourteenth Amendment's 'state action' requirement." *Id.*, at 28. The Circuit did not opine on

whether a similar broad intent could be found in the FCA, and the issue has not been preserved.

B. There Is No "Clear and Unmistakable" Expression of Congressional Intent.

Application of the FCA to States presents an Eleventh Amendment question. The same is no less true for the application of the FCA to a State administrator, when sued for conduct on behalf of the agency. The FCA provides no "unmistakably clear" intent to alter the "usual constitutional balance." *Will*, 491 U.S. at 65. The principle reflects the substantial sovereign powers of the states. *Gregory v. Ashcroft*, 501 U.S. 452, 461, 464 (1991).

The fact that States have historically been exempt from FCA claims supports the construction that State administrators are also. The FCA was adopted in 1863 to combat rampant fraud in Civil War defense contracts. *United States v. Hess*, 317 U.S. 537, n.12 (1943). The original debates from the 1863-4 Congress centered around individual plunderers. In 1863, the foremost interest of Congress and the Presidency was holding what was left of the Union together. Any interpretation of the FCA which disrupted that delicate and precarious balance would clearly not have been intended. To do so, the intent must be "plainly stated" and "unmistakable." The statute and the legislative history are silent.

VII. THE ELEVENTH AMENDMENT BARS PETITIONER'S CLAIMS. THE STATE IS THE REAL PARTY IN INTEREST.

When State officials assert immunity as a defense, courts must determine whether the "real, substantial party in interest" is actually the State. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974), quoting *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). This standard is applicable to individual capacity claims as well. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997). There, the Court addressed Eleventh Amendment immunity in the context of a suit naming numerous State officials in their individual capacities.

> When suit is commenced against State officials even if they are named and served as individuals the State itself will have a continuing interest in the litigation whenever State policies or procedures are at stake . . . Eleventh Amendment immunity represents a real limitation on a federal court's federal question jurisdiction. The real interests served by the Amendment are not to be sacrificed to elementary mechanics of captions and pleadings.

521 U.S. at 269-70.

To hold that individual administrators, as "persons," may be sued for conduct which Relators fail to allege is anything other than on behalf of the State, while also holding that the Constitution prohibits the State itself from being sued would undermine the Supreme Court's

decisions in *Garrett, Kimel and Seminole Tribe*.[1] Relators could easily, as they have transparently attempted here, evade the Eleventh Amendment merely by naming the administrator.

A suit is against the sovereign "if the effect of the judgment would be to restrain government from acting or compel it to act." *Dugan v. Rank*, 372 U.S. 609, 620 (1963). Relator has conceded Iowa's administrative rules and statutes are in compliance with Federal statutes and regulations. Gesaman is accused of violating a State administrative rule only. A request for a Federal court to intervene in the interpretation of those rules directly calls into question the sovereignty of the State. The irony of the assertion by Relator, that *Hafer* must control this case lies here: if this were, like *Hafer*, a section 1983 suit, there would be no jurisdiction of the federal courts to order the State to comport its conduct to its own administrative rules.

> In the States there is an ongoing process by which State courts and agencies work to elaborate an administrative law designed to reflect the State's own rules and traditions concerning the respective scope of judicial review and administrative discretion. . . .

Coeur d'Alene Tribe, 521 U.S. at 307.

There are literally hundreds of financial and contractual relationships between the State and the Federal

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[1] *Board of Trustees of Alabama v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000); and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

government, not only involving Medicaid, as this one, but all facets of government, including but not limited to transportation, natural resources, criminal investigation and prosecution, child support collection, tax collections, licensing and regulation, and agriculture. Those relationships are subject to monitoring, audit, and financial recovery pursuant to contract. Under Relator's theory, every audit, every claim, every contract would be subject to the "indignity of having each discrete decision . . . [of the state employee charged with implementation of state policies] subject to second guessing by a federal court." *Lizzi*, 255 F.3d at 137; *see also Alden v. Maine*, 119 S. Ct. 2240, 2264-65 (1999). Each judicial decision that a State administrator has violated a State policy would compel the State to change, not the rule, but its own interpretation of that rule or policy. "Where as here, the parties invoke federal principles to challenge State administrative action, the courts of the State have a strong interest in integrating those sources of law within their own system for the proper judicial control of State officials." *Coeur d'Alene*, 521 U.S. at 308.

The relief now purportedly sought from Gesaman's own personal assets is collection of what is alleged to be Federal dollars wrongly paid to the State. There is no question, the debtor is the State, not Mr. Gesaman. Through its contractual relationship with the Federal government, the State has always remained liable for monies wrongfully paid (frankly through offset methods far more efficient than this federal litigation). The State will necessarily have to be involved in this litigation despite its immunity.

CONCLUSION

Relator may not, merely through the artifice of inserting the descriptive word "individual," but without more, change its official acts claim against Gesaman, given the previous allegations, and the progress of this litigation. The distinction between official and personal capacity suits is "more than a mere pleading device."

Respectfully submitted,

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